Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2144

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF NEW YORK,

Petitioner,

v.

SMOSS ENTERPRISES CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 25, 1986

48 pp

QUESTIONS PRESENTED

The issue in this case involves the construction and application of subsection 1146(c) of the Bankruptcy Code [11 U.S.C. §1146(c)], infra, p. 3.

One question presented is whether "an instrument of transfer" (a deed in this case) may be held to have been delivered "under a plan confirmed under section 1129" within the meaning of subsection 1146(c), and thus exempted under the subsection from a realty transfer tax, where the transfer instrument is made and delivered pursuant to a contract for the sale of the realty, and the delivery of the instrument occurs before there is any "plan confirmed."

Another question presented is whether the exemption conferred in subsection 1146(c) applies to either the making or the delivery of an instrument of transfer in any of the following situations:

QUESTIONS PRESENTED

The issue in this case involves the construction and application of subsection 1146(a) of the Bankruptcy Code [11 U.S.C. §1146(a)], infra, p. 8.

One question presented is whether "an instrument of transfer" (a deed in this case) may be held to have been delivered "under a plan confirmed under section 1129" within the meaning of subsection 1146(a), and thus exempted under the subsection from a realty transfer tax, where the transfer instrument is made and delivered pursuant to a contract for the sale of the realty, and the delivery of the instrument occurs before there is any "plan confirmed."

Another question presented is whether the exemption conferred in subsection 1146(a) applies to either the making or the delivery of an instrument of transfer in any of the following situations:

(a) where the instrument is made and delivered under a contract of sale;

(b) where the instrument is made and delivered before there is any plan confirmed;

(c) where the plan confirmed does not explicitly provide for either the making or the delivery of such instrument; and

(d) where the plan, under which the instrument is made and delivered, is not for the debtor's corporate reorganization, but is for the debtor's liquidation.

(a) where the instrument is made and delivered under a contract of sale;

(b) where the instrument is made and delivered before there is any plan confirmed;

(c) where the plan confirmed does not explicitly provide for either the making or the delivery of such instrument; and

(d) where the plan, under which the instrument is made and delivered, is not for the debtor's corporate reorganization, but is for the debtor's liquidation.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE CITY OF NEW YORK,

Petitioner,

v.

SMOSS ENTERPRISES CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of New York respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 31, 1986.

OPINIONS BELOW

The Court of Appeals for the Second Circuit did not issue any formal opinion. In lieu of such an opinion, the court set forth its

reasons for affirming the judgment of the District Court in a written statement. The statement has not been reported. It is set forth in the appendix hereto, pp. 2a-3a, infra.

The memorandum decision of the United States District Court for the Eastern District of New York (Nickerson, D.J.) is reported at 54 B.R. 950 (D.C. 1985) and is set forth in the appendix hereto, pp. 4a-9a, infra.

The memorandum decision of the United States Bankruptcy Court for the Eastern District of New York (Goetz, B.J.) has not been reported. It is set forth in the appendix hereto, pp. 10a-15a, infra.

JURISDICTION

The date of the order of the United States Court of Appeals for the Second Circuit sought to be reviewed is March 31, 1986. The order was entered on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

For cases filed before October 8, 1984, like the case at bar, 11 U.S.C. §1146(c) provides:

> The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any State or local law imposing a stamp tax or similar tax.

By Act of July 10, 1984, Sec. 517(a), Pub. Law 98-353, 98 Stat. 388, the subsection was amended, effective for cases filed after October 7, 1984, to read:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

STATEMENT OF THE CASE

There is no dispute as to the facts of this matter, and they are well summarized in the memorandum and order of the United States

STATUTES INVOLVED

For cases filed before October 9, 1964, like the case at bar, 11 U.S.C. 1114(e) provides:

> The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any State or local law imposing a stamp tax or similar tax.

By Act of July 10, 1964, Sec. 31(a), Pub. Law 88-353, 78 Stat. 288, the subsection was amended, effective for cases filed after October 9, 1964, to read:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

STATEMENT OF THE CASE

There is no dispute as to the facts of this matter, and they are well enumerated in the memorandum and order of the United States

District Court for the Eastern District of New York (App., pp. 4a-9a).

The instant case was commenced when Smoss Enterprises Corp. (hereinafter referred to as "Smoss") moved in the Bankruptcy Court for the Eastern District of New York, by an order to show cause entered April 2, 1985, for an order (1) determining that the transfer by Smoss of its real property to G & I Properties, Inc., pursuant to a contract of sale, was exempt under subsection 1146(c) of the Bankruptcy Code from the realty transfer taxes of the State of New York and the City of New York, and (2) directing the City's Register in the County of Queens to record the deed, so conveying such realty, without the payment of those taxes.

The jurisdiction of the Bankruptcy Court was invoked by Smoss under 28 U.S.C. §§157 and 1334. Smoss had filed a petition in the Bankruptcy Court on April 30, 1984, for relief in accordance with Chapter 11 of the Bankruptcy Code.

The motion was opposed by the City of New York. In an affidavit submitted in opposition to the motion, the City disputed the assertion of Smoss that, by reason of the provisions of subsection 1146(c), its transfer of its real property was not subject to the realty transfer taxes. The City conceded that its real property transfer tax was imposed on the delivery of a deed, but pointed out that such an instrument of transfer was exempted from tax under subsection 1146(c) only when the instrument was made or delivered "under a plan confirmed under section 1129" of the Bankruptcy Code. The City also maintained that subsection 1146(c) did not apply to the delivery of the Smoss deed because it was neither made nor delivered "under a plan confirmed under section 1129" for the following reasons: (1) the conveyance of the property was being made pursuant to a pre-petition contract of January 5, 1984, and not under the plan filed by Smoss; (2) since the Smoss plan had not been confirmed, there was no "plan confirmed

under section 1129" in existence; and (3) inasmuch as the Smoss plan was one for the liquidation of Smoss, the conveyance would neither promote nor advance its corporate reorganization.

The Bankruptcy Court (Goetz, B.J.) overruled the City's objections in a memorandum decision dated May 14, 1985 (App., pp. 10a-15a), and, in an order, entered May 16, 1985, (App., pp. 16a-20a) granted Smoss the relief it had requested. On May 24, 1985, the City filed a notice of appeal from that order.

On May 29, 1985, Smoss made and delivered the deed of its real property to G & I Properties, Inc. The liquidation plan which Smoss filed on April 24, 1985, was not confirmed until September 24, 1985.

The City's appeal to the District Court was argued on October 4, 1985, before Nickerson, D.J., who, in a memorandum and order entered November 22, 1985 (App., pp. 4a-9a), affirmed the order of the Bankruptcy Court.

On December 19, 1985, the City filed a notice of appeal to the Court of Appeals. By a detailed order, dated and entered March 31, 1986, the Court of Appeals affirmed the judgment of the District Court, without a formal opinion. The order included a statement in which the Court of Appeals set forth its reasons for its affirmance. App., pp. 1a-3a.

REASONS FOR GRANTING THE WRIT

There are "special and important reasons" why this Court should exercise its discretion to review this case. See Sup. Ct. R. 17. First, the decisions below are erroneous. Second, the case presents an "important question of federal law which has not been, but should be, settled by this Court." Rule 17(c), supra. Third, the issue involved in the case is of great importance to the public.

I

THE DECISIONS BELOW ARE ERRONEOUS

Subsection 1146(c) of the Bankruptcy Code provides that "the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of (the Code) may not be taxed under any law imposing a stamp or similar tax." (11 U.S.C. §1146(c), supra, p. 3).

In the case at bar, the courts below held that, by reason of the subsection's provisions, transfers of realty which occur before confirmation of a plan, and are actually made under contracts of sale, are exempt from realty transfer taxes. Each of the courts below based its decision on the holding in the case of In re Jacoby-Bender, Inc., 758 F.2d 840 (2d Cir. 1985), rather than on the language of the exemption statute.

On its appeal to the Court of Appeals in the Jacoby-Bender case, the City argued that the delivery of a deed had not occurred under a confirmed reorganization plan because the plan

confirmed did not mention any instrument of transfer and, hence, had neither required nor authorized either the making or the delivery of the deed. In rejecting this argument, the court said, at 842:

> The City urges that a transfer instrument is not "dealt with" under a plan unless the plan mentions the instrument in so many words. On the contrary, where, as here, a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan, the plan seems implicitly to have "dealt with" the transfer instrument.

Each of the courts below regarded the second sentence of the above-quoted passage as the holding of the court in Jacoby-Bender and, relying thereon, concluded that, where a transfer of property under a pre-petition contract of sale contributes to the liquidation of a Chapter 11 debtor under a subsequently confirmed liquidation plan, the transfer is exempt under subsection 1146(c) from realty transfer taxes.

According to its memorandum decision, the Bankruptcy Court recognized that the Smoss property was being conveyed pursuant to a pre-petition contract and before the liquidation plan proposed by Smoss had been confirmed. Nevertheless, the court declared that such transfer of the property was exempted by subsection 1146(c) from the City's realty transfer tax. The court held that the property's sale was "a transfer 'under' a Chapter 11 Plan" and thus covered by the subsection because the Smoss liquidation plan depended on the sale of the property (App., p. 13a).

As appears in its memorandum and order, the District Court found that the Smoss property had been conveyed to G & I Properties, Inc., pursuant to the pre-petition contract between Smoss and Michael Savino, and that such conveyance had been made almost three and one-half months before the confirmation of the Smoss liquidation plan (App., pp. 5a-6a).

Nevertheless, that court held that the delivery of the deed conveying the property was exempt under subsection 1146(c) from the City's realty transfer tax because "the transfer of the property was essential to the confirmation of the plan." (App., p. 8a).

The Court of Appeals, in its statement affirming the judgment of the district court, said that Judge Nickerson correctly affirmed the order of the bankruptcy court because the success of the Smoss plan was predicated upon the assignment of the pre-petition contract by Savino to Pantios (App., p. 2a).

In thus ruling that the exemption conferred by subsection 1146(c) extends to preliminary transfers of property if the transfers are necessary preparatory steps to the confirmation of, or to the success of, a subsequently confirmed plan, the courts below have flagrantly misconstrued the language of the statute.

In the first place, the courts below are not correct when they imply that the subsection

provides that all transfers pursuant to reorganization plans are tax exempt. (See App., pp. 2a, 7a-8a, 13a). The only kind of transfer exempted from tax by the language of the statute is a transfer of a security. With respect to property other than "a security", the subsection relates only to "an instrument of transfer" by which title to such property is conveyed, and exempts "the making or delivery" of such an instrument only if its "making or delivery" takes place "under a plan confirmed under section 1129."

Moreover, the exemption statute is part of section 1146, which is labeled "Special Tax Provisions", and is one of the sections in subchapter III of chapter 11. Subchapter III is entitled "Postconfirmation Matters." Obviously, the subchapter and its sections are intended to relate only to actions which are required to be taken after confirmation of a plan, and are necessary to vest the title of the debtor's property in those specified in the plan.

Thus, the unambiguous language of subsection 1146(c) clearly demonstrates that the exemption conferred by it does not apply to the delivery of a deed which is delivered before confirmation of a plan and under a contract of sale, but is limited to the delivery of deeds where their delivery both (1) follows on the confirmation of a plan, and (2) is specifically required by a plan confirmed under section 1129. Both legislative history and the purpose of the statute also support this interpretation of its meaning.

The Report of the House Committee on the Judiciary to accompany H.R. 8200 on the Bankruptcy Reform Act of 1978 stated:

> Another provision that affects the method of taxation in bankruptcy applies only in chapter 11. Section 1146(c) of title 11 is modeled after section 267 of the Bankruptcy Act which exempts any security or transfer instrument dealt with under a confirmed chapter X plan from any State or Federal stamp tax. Section 1146(c) of title 11 broadens the exemption to

Thus, the unambiguous language of subsection 1146(c) clearly demonstrates that the exemption conferred by it does not apply to the delivery of a deed which is delivered before confirmation of a plan and under a contract of sale, but is limited to the delivery of deeds where their delivery both (1) follows on the confirmation of a plan, and (2) is specifically required by a plan confirmed under section 1123. Both legislative history and the purpose of the statute also support this interpretation of its meaning.

The Report of the House Committee on the Judiciary to accompany H.R. 8200 on the Bankruptcy Reform Act of 1978 explains:

> Another provision that affects the method of taxation in bankruptcy applies only in chapter 11. Section 1146(c) of title 11 is modeled after section 821 of the Bankruptcy Act which exempts any security or transfer instrument dealt with under a confirmed chapter X plan from any State or Federal stamp tax. Section 1146(c) of title 11 broadens the exemption to

> any stamp tax or similar tax on a security or a transfer instrument dealt with under the consolidated chapter 11. No opposition has been voiced with respect to this section. (Underlining supplied.) H.R.Rep. No. 595, 95th Cong., 1st Sess. 281 (1977)

This statement indicates that, although Congress, in enacting subsection 1146(c), intended to expand the tax exemption of former section 267 to cover taxes similar to a stamp tax, it did not intend to otherwise broaden the application of that tax exemption when it included it as subsection 1146(c) in the consolidated chapter 11 of the new Bankruptcy Code.

The legislative history and purpose of former section 267 and its statutory derivations are set forth in 6A Collier on Bankruptcy ¶15.08, at 836-840 (14th ed., 1977). The treatise demonstrates that the purpose of Congress in enacting section 267 was to coordinate bankruptcy law with federal stamp tax law, and to ensure corporations reorganized

under Chapter X of the Bankruptcy Act the same tax treatment accorded other reorganized corporations under the Internal Revenue Code. In a corporate reorganization under Chapter X, the confirmed plan would provide for the conveyance of the debtor's property to a reorganized corporation and for the issuance of securities by the reorganized corporation to the debtor's creditors in satisfaction of their claims. Since neither such conveyance of the debtor's property, nor such issuance of securities to the debtor's creditors, was considered to have been made for new consideration, they were exempted from a stamp tax in section 267 of Chapter X, as well as in the Internal Revenue Code.

Accordingly, the treatise states, at 840:

> Both the provisions of § 267 and those of the Internal Revenue Code with its amendments make it clear that the exemption conferred relates only to transactions otherwise taxable which serve to execute or make effective a plan confirmed under Chapter X. They do not extend any

> exemption to transactions (that is, transfers, issuance, etc.) which occur prior to the confirmation of the plan and which are merely preparatory steps.

The above statement of the House Judiciary Committee also proves that it was the understanding of Congress that section 267 of the Bankruptcy Act exempted the issuance of a security or the delivery of a transfer instrument from a stamp tax only when the security or transfer instrument was "dealt with" under a confirmed reorganization plan in Chapter X, and that Congress intended subsection 1146(c) likewise to exempt the making or delivery of a transfer instrument from tax only when "dealt with" in a confirmed reorganization plan under the new consolidated Chapter 11.

It cannot be said that a deed or other transfer instrument is "dealt with" in a confirmed plan when the instrument, like the deed involved in the case at bar, is never mentioned in such a plan. In cases, like that at

bar, where the debtor's realty is conveyed pursuant to a contract of sale, it would be inappropriate for a plan to "deal with", or even mention, the deed transferring title to the property since the delivery of such transfer instrument is required and governed by the contract of sale. Neither can it be said that the making or delivery of a deed occurs under a plan when such instrument of transfer is actually made and delivered pursuant to a contract of sale as in the case at bar.

Thus, the plain meaning of the statute, its legislative history, and its purpose, all indicate that Congress never intended it to exempt from tax the delivery of a deed where the delivery of such transfer instrument is made either under a contract of sale or before there is any plan confirmed. Consequently, the construction and application of subsection 1146(c) by the courts below is very wrong, and should not be allowed to stand.

II

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The construction of subsection 1146(c) is an important question of first impression. The Court has never been required to interpret the meaning or determine the application, of the subsection, or even of its precursor section 267.

In fact, counsel has been unable to discover any court decisions interpreting and applying either subsection 1146(c), or its precursor section 267, as in the Jacoby-Bender case and the case at bar. Apparently, until Jacoby-Bender, everyone considered the tax exemption as being limited to instruments of transfer, the delivery of which was actually made under a confirmed plan for the reorganization of a corporation.

By altering the plain meaning of subsection 1146(c) in order to extend its exemption to a deed which is delivered before confirmation of a plan, and is actually made under a contract of

II

THIS CASE PRESENTS AN IMPORTANT
QUESTION OF FEDERAL LAW WHICH
SHOULD BE SETTLED BY THIS COURT

sale, the lower courts have left the intent and meaning of the statute in a state of confusion.

The intent and meaning of subsection 1146(c) are questions of general consequence in an important area of federal law. Consequently, the Court should not let the wrong decisions of the courts below stand. Instead, the Court should review this case to produce an opinion that will give guidance to lower courts in a now unsettled area badly in need of the Court's authoritative voice.

III

The Issue Involved In The Case Is Of Great Importance To The Public

The construction of subsection 1146(c) is of fiscal importance not only to the City of New York, but also to many state and local governments throughout the country.

Research has disclosed that approximately seventy-five percent of the states, and many of their counties and cities, impose realty transfer taxes on the making or delivery of deeds.

Hence, the erroneous decisions of the courts below, if allowed to stand, will lead to widespread litigation, and adversely affect the tax revenues of most of the states and many of their political subdivisions.

Accordingly, this case presents issues of significant importance to the public nationwide, and well warrants discretionary review in this Court.

CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Dated: June 25, 1986

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of March one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

HONORABLE GEORGE C. PRATT,

Circuit Judges.

----------X

IN RE SMOSS ENTERPRISES CORP.,

Debtor,

THE CITY OF NEW YORK,

Appellant,

-against- 85-5106

SMOSS ENTERPRISES CORP.,

Appellee.

----------X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Docket No. 85-5106
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1. The City of New York argues that the transfer of Smoss's apartment complex should have been subject to the City's real property transfer tax. The bankruptcy and district judges, however, held that the parcel was exempt from that tax pursuant to 11 U.S.C. §1146(c), which provides that transfer pursuant to reorganization plans are tax exempt. We have ruled that where "a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan," the transfer is "under a plan" within the meaning of the Bankruptcy Code. In re Jacoby-Bender, 758 F.2d 840, 842 (2d Cir. 1985). Both the bankruptcy and district judges found the success of the reorganization plan was predicated upon the assignment of the contract by Savino and Pantios. Accordingly, Judge Nickerson correctly affirmed the order of the bankruptcy court.

2. The appellant's contention that "liquidation" plans do not fall within the ambit of Section 1146 is equally unavailing. The Bankruptcy

Code clearly indicates that liquidation plans may also be deemed reorganization plans. 11 U.S.C. §1129(a).

3. We have considered New York City's other claims and consider them to be without merit.

3. Accordingly, the judgment of the district court is affirmed.

S/
IRVING R. KAUFMAN,

S/
THOMAS J. MESKILL,

S/
GEORGE C. PRATT,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

(The above order was entered March 31, 1986.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

IN RE: 85 C 2084

SMOSS ENTERPRISES CORP.,

MEMORANDUM AND ORDER

Debtor.

----------X

THE CITY OF NEW YORK,

Appellant,

-against-

SMOSS ENTERPRISES CORP.,

Appellee.

----------X

FREDERICK A. O. SCHWARZ, JR., ESQ.,
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(Harold S. Berzow, Esq., of counsel)
New York, New York
for appellee

NICKERSON, District Judge

This is an appeal from an order of Bankruptcy Court in a Chapter 11 proceeding under the Bankruptcy Code. The order provides that the transfer of the debtor's real property pursuant to a contract of sale dated March 20, 1985 is exempt from New York State and City real property transfer taxes under §1146(c) of the Bankruptcy Code. The State of New York does not oppose the order. The City of New York ("the City") appeals.

Smoss Enterprises Corp. ("Smoss") filed a voluntary petition under Chapter 11 on April 30, 1984. At that time its only asset was a parcel of real property located in Queens, New York. Smoss had made a pre-petition contract to sell the property to Michael Savino for $2,365,000. On June 12, 1984 Smoss moved before the Bankruptcy Court to reject the contract. Savino opposed the rejection. Had the court rejected the contract Smoss would have been liable to

Savino for a substantial sum representing the difference between the market value and the contract price of the property.

Thereafter Savino and Smoss reached a settlement, approved by the Bankruptcy Court, authorizing Savino to assign the contract to Steve Pantios at a price of $2,800,000, in consideration for the payment of $500,000 by Pantios to Savino. Pantios then assigned the contract to G & I Properties, Inc., a corporation of which Pantios is the principal. Upon application of Smoss, on May 14, 1985 the Bankruptcy Court held that a transfer by Smoss of the property to G & I Properties, Inc. would be exempt from state and city real property transfer taxes. On May 29, 1985 Smoss made the transfer. On September 11, 1985 the Bankruptcy Court confirmed Smoss's liquidation plan under Chapter 11.

The City claims that the property transferred pursuant to Smoss's pre-petition contract is not exempt from the real property

transfer tax. Section 1146(c) of the Bankruptcy Code states:

> The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any state or local law imposing a stamp tax or similar tax.

The City claims that this section is inapplicable to the transfer for three reaosns: (1) the transfer was made pursuant to a pre-petition contract rather than "under a plan" of reorganization, (2) the transfer took place prior to the time the Bankruptcy Court "confirmed" the plan and (3) the plan is for liquidation rather than "reorganization" and therefore is not a plan confirmed "under section 1129," which appears in the Chapter 11 sections of the Bankruptcy Code.

I

Recently the Second Circuit held where "a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan," the

transfer tax. Section 1146(c) of the Bankruptcy Code states:

> The instrument, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of [the Code], may not be taxed under any state or local law imposing a stamp tax or similar tax.

The City claims that this section is inapplicable to the transfer for three reasons: (1) the transfer was made pursuant to a pre-petition contract rather than "under a plan" of reorganization, (2) the transfer took place prior to the time the Bankruptcy Court "confirmed" the plan and (3) the plan is for liquidation rather than "reorganization" and therefore is not a plan confirmed "under section 1129," which appears in the Chapter 11 sections of the Bankruptcy Code.

I

Recently the Second Circuit held where "a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan," the

transfer is "under a plan" within the meaning of §1146(c). In re Jacoby-Bender, 758 F.2d 840, 842 (2d Cir. 1985). In the present case the transfer of the property was essential to the confirmation of the plan. The reasoning of the Jacoby-Bender case is applicable.

II

The transfer was made pursuant to the pre-petition contract to avoid the liability of Smoss to Savino which rejection would have occasioned. The plan was confirmed after the delivery of the deed because the plan depended entirely on the sale of the property. But the transfer was contemplated by the Bankruptcy Court when it ruled on Smoss's application for exemption. Moreover, the transfer was a precondition to the confirmation and implementation of the plan. The language of §1146(c) exempting a transfer by the Bankruptcy Court was surely designed to reach the one transfer on which the plan hinged and which the court had to approve prior to the confirmation.

III

Finally, the claim that §1146(c) applies to plans only of "reorganization" and not of "liquidation" is plainly meritless. Section 1129(a) specifying the requirements for confirmation of a plan expressly provides for a "liquidation" plan. See also Matter of Combined Metals Reduction Co., 557 F.2d 179, 197-98 (9th Cir. 1977), and cases cited therein.

The order of the Bankruptcy Court is affirmed. So ordered.

Dated: Brooklyn, New York
November 19, 1985

S/
Eugene H. Nickerson, U.S.D.J.

(The foregoing memorandum and order was entered on November 22, 1985).

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X

In the Matter of	Bankruptcy No.
SMOSS ENTERPRISES CORP.	184-40759-21
	MEMORANDUM

----------X

CECELIA H. GOETZ, Bankruptcy Judge:

Smoss Enterprises Corp., the debtor herein, has moved by Order to Show Cause for an order determining that the debtor's transfer of real property to G & I Properties, Inc., pursuant to a contract of sale dated March 20, 1985, is exempt from the tax imposed by the New York State Real Transfer Tax and the New York City Real Property Transfer Tax, by reason of § 1146 of the Bankruptcy Code. Section 1146(c) of the Bankruptcy Code provides that: "The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any

law imposing a stamp tax or similar tax." This language was recently given a broad construction by the Court of Appeals of the Second Circuit in In re Jacoby-Bender, Inc. (City of New York v. Jacoby-Bender, Inc.), __F.2d.__ (1985), Slip Op. No. 791, August Term 1984; Docket No. 84-5091 (decided March 27, 1985). The decision affirmed the result reached by Bankruptcy Judge Robert J. Hall in In re Jacoby-Bender, 34 B.R. 60 and 40 B.R. 10 Bkrtcy. Ct. E.D.N.Y. 1984) which had been affirmed by District Judge Frank X. Altimari in an unreported decision.

Smoss filed a voluntary petition under Chapter 11 on April 30, 1984. It has filed a plan of reorganization, now awaiting confirmation, predicated on the sale of all its real property, its sole asset, to G & I Properties, Inc. for a total consideration of $2,800,000. It is this transfer which it wishes to have declared exempt from New York City's real estate tax.

So far as New York State is concerned, the Attorney General of the State of New York, acting as attorney for the New York State Department of Taxation and Finance, has stipulated that the contemplated transfer is exempt from the State tax under Section 1146.

However, the Corporation Counsel, representing the City of New York, maintains that this case is distinguishable from Jacoby-Bender for the following reasons:

(1) The transfer is being made pursuant to a pre-petition contract, not pursuant to the plan of reorganization;

(2) The plan of reorganization has not as yet been confirmed so that the transfer is not "under a plan";

(3) The debtor's plan is one of liquidation, and not of reorganization.

The Corporation Counsel has submitted no memorandum of law and no authorities to support its position that the differences in the facts of this case from those before the court in

Jacoby-Bender requires a different result. In the view of this Court, the case falls squarely within the law as laid down by the Second Circuit.

That the sale here involved has its origin in a pre-petition contract does not make it any the less a transfer "under" a Chapter 11 Plan when the transfer, whatever its provenance, is the keystone of the debtor's plan. Exactly as in Jacoby-Bender "the plan's consummation depend[s] almost entirely on the sale of the building," Slip Op. at 2759. Thus, the transfer is covered by Section 1146(c).

The contention that Section 1146(c) does not apply because the proposed plan has not yet been confirmed has no merit. To require confirmation of the debtor's plan before the transfer can take place when the plan itself depends on the sale of which the transfer is an integral part, would simply create a Catch 22 situation. If the plan fails of confirmation, it will be time enough for the City to claim the tax

which a transfer made under a plan of reorganization escapes.

The argument that 11 U.S.C. § 1146 has no application where the plan is one of liquidation, rather than reorganization, files into the teeth of the statute which makes no such distinction. It is of a character with the City's argument in Jacoby-Bender that Section 1146(c) does not apply to a transfer to "an unrelated third party." The Second Circuit rejected that contention on the ground that Congress deliberately employed a word of broad meaning, i.e., "transfer," when describing the transactions covered by Section 1146(c) and that there was no basis for giving that word anything other than its ordinary meaning. Slip Op. at 2760-61. That the "transfer" is pursuant to a plan of liquidation does not make it any the less a transfer under a plan.

For the foregoing reasons, the objections of the Corporation Counsel of the City of New York

are overruled and the relief requested by the debtor is allowed.

S/
CECELIA H. GOETZ
Bankruptcy Judge

Dated: Brooklyn, New York
May 14, 1985

(The above memorandum was entered May 16, 1985.)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X

IN THE MATTER

-of-

No.
184-40759-21

SMOSS ENTERPRISES CORP., ORDER

Debtor.
----------X

Upon reading and filing the order to show cause of this court dated April 2, 1985 based upon the application of Smoss Enterprises Corp. the debtor dated March 29, 1985 with the exhibits annexed thereto seeking an order determining that the debtor's transfer of real property to G & I Properties, Inc. pursuant to a contract of sale dated March 20, 1985 is exempt from the taxes imposed by the New York State Real Estate Transfer Tax and the New York City Real Property Transfer Tax, by reason of §1146 of the Bankruptcy Code and directing the Register of Queens County to accept the debtor's deed relating to its premises located between 147th and 150th Streets, Queens, New York for

16a

recording, without payment of the aforementioned taxes; and upon reading and filing the affidavit in opposition of Cornelius F. Roche of the Corporation Counsel of The City of New York, sworn to May 6, 1985 with the exhibits annexed thereto; and upon reading and filing the stipulation between the debtor and the Attorney General of the State of New York, attorney for the New York State Department of Taxation and Finance dated April 26, 1985 and said motion having come on to be heard before this Court on May 7, 1985 and after hearing Finkel, Goldstein & Berzow, attorneys for the debtor in support of the application and Cornelius F. Roche of the Corporation Counsel of The City of New York in opposition to said motion insofar as it relates to the New York City Real Property Transfer Tax and the New York State Department of Taxation and Finance not objecting to the relief requested by the debtor as it relates to the New York State Real Estate Transfer Tax; and upon the Memorandum Decision of this Court dated May

14, 1985; and it appearing that the debtor has contracted to sell all of its real property to G & I Properties, Inc. for the sum of $2,800,000, which contract has previously been approved by this Court on March 25, 1985 and it appearing that the debtor has filed a plan of reorganization dated April 23, 1985 which makes specific references to the contract of sale of the real property and that the entire proceeds of said sale will be used to fund the debtor's liquidation plan, it is

ORDERED, that the debtor's transfer of real property as per Schedule A annexed hereto G & I Properties, Inc. is exempt from the tax imposed by the New York State Real Estate Transfer Tax and the New York City Real Property Transfer Tax; and it is further

ORDERED, that the Register of Queens County is hereby directed to accept the debtor's deed relating to the property more particularly described in Schedule A annexed and recording

same without the payment of the aforementioned taxes.

Dated: Brooklyn, N.Y.
May 14, 1985

Bankruptcy Judge

(The above order, together with the attached "Schedule A", was entered May 16, 1985.)

SCHEDULE A

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough and County of Queens, City and State of New York, bounded and described as follows:

PARCEL 1:

BEGINNING at a point on the northerly side of 75th Road, distant 100 feet westerly from the corner formed by the intersection of the northerly side of 75th Road with the westerly side of 150th Street as said Road and Street are laid down on the Final Topographical Map of the City of New York; RUNNING THENCE WESTERLY along the northerly side of 75th Road 400 feet, THENCE NORTHERLY at right angles to the northerly side of 75th Road, 100 feet; THENCE EASTERLY parallel with the northerly side of 75th Road, 100 feet; THENCE SOUTHERLY at right angles to the northerly side of 75th Road, 100 feet to the point or place of BEGINNING.

PARCEL 2:

BEGINNING at the corner formed by the intersection of the westerly side of 150th Street with the northerly side of 76th Avenue as said street and avenue are laid down on the Final Topographical Map of the City of New York; RUNNING THENCE WESTERLY along the northerly side of 76th Avenue 600 feet to the easterly side of 147th Street; THENCE NORTHERLY along the easterly side of 147th Street 200 feet to the southerly side of 75th Road; THENCE EASTERLY along the southerly side of 75th Road, 600 feet to the westerly side of 150th Street; THENCE SOUTHERLY along the westerly side of 150th Street, 200 feet to the point or place of BEGINNING.

(The above order was entered May 16, 1985.)
PARCEL 3:

BEGINNING at the corner formed by the intersection of the southerly side of 76th Avenue and the easterly side of 147th Street as said avenue and street are laid down on the Final Topographical Map of the City of New York; RUNNING THENCE EASTERLY along the southerly side of 76th Avenue, 160 feet; THENCE SOUTHERLY at right angles to the southerly side of 76th Avenue, 200 feet to the northerly side of 76th Road; THENCE WESTERLY along the northerly side of 76th Road, 160 feet to the easterly side of 147th Street; THENCE NORTHERLY along the easterly side of 147th Street, 200 feet to the southerly side of 76th Avenue, the corner, the point or place of BEGINNING.

SAID PREMISES being known as and by the street numbers 147-15, 147-19, 147-39, 147-45 75th Road; 147-09, 147-11, 147-15, 147-17, 147-33, 147-35, 147-39, 147-41 76th Avenue; 147-06, 147-10 76th Avenue and 75-34, 75-40 150th Street, Queens, New York.

(The above order was entered May 16, 1985.)

Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF NEW YORK,

Petitioner,

vs.

SMOSS ENTERPRISES CORP.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985
No. 85-2144

THE CITY OF NEW YORK,

Petitioner,

v.

SMOSS ENTERPRISES CORP.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of respondent Smoss Enterprises Corp. (hereinafter "the debtor") in opposition to the petition of the City of New York (hereinafter "the City") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit from an

order entered in the above proceedings on March 31, 1986.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether the tax exemption as provided by §1146(c) of the Bankruptcy Code (11 U.S.C.§1146(c)) applies to the sale of real property by a Chapter 11 debtor-in-possession, which sale is absolutely essential to consummation of the debtor's plan of reorganization, although the sale itself precedes actual confirmation of the plan of reorganization?

COUNTER-STATEMENT OF THE CASE

A. INTRODUCTION

By the instant petition, the City seeks further Appellate review of the principles laid down by the United States Court of Appeals in In re Jacoby-Bender, Inc., 758 F.2d 840 (2d Cir. 1985), as

affirmed in the case at bar, concerning the proper construction and applicability of §1146(c) of the Bankruptcy Code.

The courts below were unanimous in their view that the tax exemptions granted by §1146(c) of the Bankruptcy Code are applicable to transfers of property which form the foundation of a Chapter 11 plan of reorganization, or as noted by the Bankruptcy Court constitute the "keystone of the debtor's plan", regardless of whether the transfer is actually effectuated under a confirmed plan of reorganization, or precedes same. The critical point of inquiry as interpreted by the lower courts involves the relationship between the transfer of property and the debtor's plan of reorganization, and where the two events are inextricably intertwined, the tax exemption applies. This analysis not

only underscores an appreciation of the mechanics involved in a reorganization case, but serves to reinforce the rehabilitative goals which prompted tax relief under §1146(c) ab initio.

Given the relationship described above, the debtor believes certain facts concerning its reorganization efforts deserve mention in order to crystallize the significance of the debtor's sale of real property in terms of its ability to formulate and confirm a plan of reorganization. The pertinent facts bearing upon this relationship are discussed below.

B. BANKRUPTCY PROCEEDINGS

The debtor filed for relief under Chapter 11 of Title 11 of the United States Code (11 U.S.C.§301 et. seq.) ("the Code") on April 30, 1984 and thereafter continued in possession and

management of its property as a debtor-in-possession pursuant to §§1107 and 1108 of the Code. At the time of the Chapter 11 filing, the debtor owned as its sole asset, a 178 unit garden apartment complex located in Queens, New York ("the real property").

This real property was encumbered by three separate mortgages which were in default and subject to state foreclosure proceedings prior to bankruptcy. While the foreclosure proceedings were pending, the debtor, in an effort to salvage its equity in the real property, entered into a written agreement with one Michael Savino dated January 5, 1984 ("the Savino contract"). The Savino contract provided for a sale of the real property at an aggregate purchase price of $2,365,000.00.

Prior to a closing with Savino, the debtor filed its petition under Chapter

11 effectuating a stay of all pending state court foreclosure proceedings pursuant to §362 of the Code. The bankruptcy filing also afforded the debtor additional time to reassess its position vis a vis the Savino contract and to explore alternate sources of financing which might be used to satisfy the claims of creditors.

While operating as a debtor-in-possession, the debtor was approached by a religious congregation ("the congregation") which expressed an interest in funding a plan of reorganization through a financing arrangement. Under the terms of the proposed financing agreement, the congregation would acquire ninety (90%) percent of the debtor's stock interest in consideration for its commitment to post a fund of $2,800,000.00 which would be used to pay creditors. Implementation

of the financing agreement, however, necessitated that the debtor reject the Savino contract pursuant to §365 of the Code upon the grounds that same represented a burdensome executory agreement and was not in the best interests of the estate.

Protracted litigation ensued in the Bankruptcy Court concerning the debtor's motion to reject the Savino contract. The issues before the Bankruptcy Court were complicated by the fact that Savino, as a contract vendee, was entitled to assert a claim for compensatory damages pursuant to §502(g) of the Code by reason of the rejection equal to the difference between the market value of the real property and the contract price. Since the value of the real property had appreciated significantly, Savino's potential damage claim loomed large in terms of formulating a plan of

reorganization, and ultimately made the financing agreement unattractive. Exacerbating matters was the fact that the congregation experienced financial difficulties and there was growing doubt as to its wherewithal to fund an eventual plan of reorganization.

Fortunately, however, the debtor was able to procure still another party who was interested in acquiring the real property, while capable of satisfying all related damage claims. Ultimately, the debtor entered into an agreement with an entity known as G&I Properties, Inc. ("G&I") wherein G&I acquired the real property via an assignment of the Savino contract for a cash consideration of $500,000.00. G&I also agreed to modify the Savino contract so as to increase the purchase price thereunder from $2,365,000.00 to $2,800,000.00. This arrangement eliminated Savino's residual

damage claim, and established a fund of $2,800,000.00 earmarked for the payment of claims, paving the way for a successful reorganization.

The debtor's agreement with G&I was approved by the Bankruptcy Court by order dated March 13, 1985. Shortly thereafter the debtor filed a liquidating plan of reorganization which was confirmed by the Bankruptcy Court on September 11, 1985.

The debtor's plan provided an excellent return to general creditors, as well as full payment to secured and priority claims. It is undisputed, even by the City, that absent a sale of the real property to G&I, the debtor would not have been in a position to propose a plan of reorganization, let alone confirm one. As such, the sale constituted the

lynchpin of the debtor's rehabilative efforts.

C. THE TAX EXEXMPTION UNDER §1146(c) OF THE CODE

After gaining Bankruptcy Court approval to sell the real property, the debtor moved by order to show cause dated April 2, 1985 seeking the following relief: (1) an order declaring that the sale of the real property to G&I was exempt from the collection and payment of local transfer taxes (New York City Real Estate Transfer Tax, N.Y.C. Admin. Code §II46-50) and New York State Real Estate Transfer Tax, N.Y. Tax Law §1402 (McKinney Supp. 1985-1986)) by reason of §1146(c) of the Code; and (2) an order directing that the City Register, Queens County accept the debtor's deed for recording without payment of the aforementioned taxes.

Significantly, the State of New York recognized the applicability of §1146(c) to the transaction and did not object to the proposed tax exemption. The City, however, objected to the debtor's motion upon the principal ground that the sale was made pursuant to a pre-confirmation contract of sale and therefore was not made under "a confirmed plan" within the meaning of §1146(c) of the Code. The City also questioned the applicability of the tax exemption to liquidating plans of reorganization.

The Bankruptcy Court summarily dismissed all of the City's objections noting that the case fell "squarely within the law as laid down by the Second Circuit" in Jacoby-Bender. (App., p.13a). The Bankruptcy Court further concluded that while the transfer was made pursuant to a pre-confirmation contract of sale, the exemption should

nevertheless apply since "whatever its providence" the transfer was "the keystone of the debtor's plan" and "[e]xactly as in Jacoby-Bender 'the plan's consummation depend[s] almost entirely on the sale of the building'". (App. p. 13a).

The decision and order of the Bankruptcy Court was affirmed by the United States District Court for the Eastern District of New York, as per Judge Eugene H. Nickersen, who also commented about the symbiotic relationship between the sale of the debtor's plan of reorganization, stating in pertinent part:

> The language of §1146(c) exempting the transfer by the Bankruptcy Court was surely designed to reach the one transfer on which the plan hinged and which the Court had to approve prior to confirmation." (App., p.8a).

The Circuit Court affirmed the rulings of both lower courts based upon its previous holding in Jacoby-Bender, supra. Since it was uncontroverted that the success of the debtor's reorganization plan was dependent upon the transfer of its real property, the Circuit Court affirmed Judge Nickersen and allowed the debtor to take advantage of the tax exemption under §1146(c) of the Code. (App., p. 1a-3a).

REASONS FOR DENYING THE WRIT

The City's petition for a writ of certiorari must fail for lack of substantiality, both in terms of the question of law presented for review and the absence of any conflict among the Circuit Courts on this issue. See, Sup. Ct. R. 17(1)(a) and (c).

Indeed, the issues before the Court involve narrow points of bankruptcy law,

as evidenced by the lack of prior precedent and the dearth of legislative history, which have little significance outside the scope of this case, given the relative infrequency of single asset reorganization cases involving exclusively real property. Moreover, the Circuit Court's previous opinion in Jacoby-Bender supra, as reaffirmed here, has not been challenged, distinguished, or disavowed by any federal court in the nation and represents a practical construction of §1146(c) of the Code which gives full effect to the ameliorative purposes underlying Chapter 11 rehabilitation.

1

THE CIRCUIT COURT PROPERLY HELD THAT THE DEBTOR'S TRANSFER WAS EXEMPT UNDER §1146(c) OF THE CODE

The City's objection to the lower court's decisions is based upon the

following elements: (1) an overly rigid reading of §1146(c) which does not comport with the rehabilitative aims of Chapter 11; and (2) a glaring mischaracterization of the transfer in terms of the viability of the debtor's plan of reorganization.

Throughout its petition, the City appears fond of mischaracterizing the debtor's transfer to G&I as a mere "preparatory step" to confirmation, when in fact it is obvious that the debtor's plan was entirely dependent upon the sale. The City's failure to reconcile these two event renders its argument inconsequential, if not frivolous, which abrogates the need for further review.

Section 1146(c) of the Code provides as follows:

> "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under Section 1129 of this title, may not be taxed under any State or local law imposing a stamp tax or similar tax."

In Jacoby-Bender supra, the City pressed an overly semantic argument seeking to limit the tax exemption to only those cases where the debtor's plan of reorganization made specific reference to the proposed transfer.

The Circuit Court, however, found such an argument unavailing as it ignored the realities of a reorganization case. Instead the Circuit Court gave a practical construction to the term "under a plan" within the meaning of §1146(c) so as to include transfers which as a factual matter provide the financial basis for confirming a plan. These

sentiments were expressed in the following passages:

> "Here, as the Bankruptcy Court found, 'the plan's consummation depended almost entirely upon the sale of the building,' the sale in turn depending upon the delivery of the deed. That the plan did not empower the debtor to make a specific sale or deliver a specific deed is irrelevant to our determination that the delivery of the deed took place 'under' the plan within the meaning of §1146(c)." Jacoby-Bender at 841.

The Circuit Court continued at p.842:

> "The City urges that a transfer instrument is not 'dealt with' under a plan unless the plan mentions the instrument in so many words. On the contrary, where, as here, a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan, the plan seems implicitly to have 'dealt with' the transfer instrument."

The principles set forth in the Jacoby-Bender decision were followed and

reaffirmed in the case at bar. Inasmuch as the debtor's plan here was also dependent upon the sale of its real property, the exemption was deemed to apply. Again this construction of §1146(c) represents a realistic approach to the tax exemption issue.

The City has not demonstrated sufficient reason to upset this result. The fact that the sale here slightly preceded confirmation matters very little in terms of the overall results achieved in the case. Regardless of how the plan was worded, the fact remains that the debtor, owning a single asset, could not consummate a settlement with creditors absent the sale. Very simply, the entire bankruptcy case hinged upon the debtor's ability to market the property at an optimum price. At such, an overly rigid interpretation of §1146(c) would frustrate the spirit of

rehabilitation, a result which the Circuit Court properly guarded against.

II

THE ISSUES PRESENTED HEREIN ARE NOT PERVASIVE SO AS TO WARRANT SUPREME COURT REVIEW

The City for the sake of its own self-interest has exaggerated the importance of the lower court's decisions in terms of maintaining the public fisc. Firstly, the fact that tax relief as exemplified by §1146(c) is available to Chapter 11 debtors is indicative of Congressional efforts to facilitate reorganization even at the expense of public treasuries. An overly technical interpretation of the exemption provision under §1146(c) as urged by the City would undermine these efforts.

Lastly, the lower court's construction of §1146(c) does not invite potential abuse since as noted by the

Bankruptcy Court "[i]f the plan fails of confirmation, it will be time enough for the City to claim the tax which a transfer made under a plan of reorganization escapes." (App., p.13a-14a)

In view of the foregoing, public policy concerns raised by the City are of little moment and do not warrant the grant of certiorari in this case.

CONCLUSION

For the reasons set forth herein, the City's petition for a writ certiorari should be denied.

Dated: July 25, 1986

Respectfully submitted,

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